TUESDAY MORNING
JULY 27, 2004

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 1

On August 1, 2002, Dan, Art, and Bert entered Vince's Convenience Store. Dan and Art pointed guns at Vince as Bert removed $750 from the cash register. As Dan, Art, and Bert were running toward Bert's car, Vince came out of the store with a gun, called to them to stop, and when they did not do so, fired one shot at them. The shot hit and killed Art. Dan and Bert got into Bert's car and fled.

Dan and Bert drove to Chuck's house where they decided to divide the $750. When Chuck said he would tell the police about the robbery if they did not give him part of the money, Bert gave him $150. Dan asked Bert for $300 of the remaining $600, but Bert claimed he, Bert, should get $500 because his car had been used in the robbery. Dan became enraged and shot and killed Bert. He then decided to take all of the remaining $600 for himself and removed the money from Bert's pocket.

On August 2, 2002, Dan was arrested, formally charged with murder and robbery, arraigned, and denied bail. Subsequently, the court denied Dan's request that trial be set for October 15, 2002, and scheduled the trial to begin on January 5, 2003. On January 3, 2003, the court granted, over Dan's objection, the prosecutor's request to continue the trial to September 1, 2003, because the prosecutor had scheduled a vacation cruise, a statewide meeting of prosecuting attorneys, and several legal education courses. On September 2, 2003, Dan moved to dismiss the charges for violation of his right to a speedy trial under the United States Constitution.

1. May Dan properly be convicted of either first degree or second degree murder, and, if so, on what theory or theories, for:
    a. The death of Art? Discuss.
    b. The death of Bert? Discuss.

2. May Chuck properly be convicted of any crimes, and, if so, of what crime or crimes? Discuss.

3. How should the court rule on Dan's motion to dismiss? Discuss.

Question 2

State X amended its anti-loitering statute by adding a new section 4, which reads as follows:

> A person is guilty of loitering when the person loiters, remains, or wanders about in a public place, or on that part of private property that is open to the public, for the purpose of begging.

Alice, Bob, and Mac were separately convicted in a State X court of violating section 4.

Alice was convicted of loitering for the purpose of begging on a sidewalk located outside the City's Public Center for the Performing Arts in violation of section 4.

Bob was convicted of loitering for the purpose of begging on a waiting platform at a stop on City's subway system in violation of section 4.

Mac was convicted of loitering for the purpose of begging in the lobby of the privately owned Downtown Lawyers Building located in the business district of City in violation of section 4.

Alice, Bob, and Mac have each appealed their convictions, and their appeals have been consolidated in the State X appellate court. It has been stipulated that Alice, Bob, and Mac are indigent, that section 4 is not void for vagueness, and that the only issue on appeal concerns the validity of section 4 under the First Amendment to the United States Constitution.

How should the appellate court decide the three appeals, and why? Discuss.

Question 3

Hank, an avid skier, lived in State X with his daughter, Ann. Hank's first wife, Ann's mother, had died several years earlier.

In 1996, Hank married Wanda, his second wife. Thereafter, while still domiciled in State X, Hank executed a will that established a trust and left "five percent of my estate to Trustee, to be paid in approximately equal installments over the ten years following my death to the person who went skiing with me most often during the 12 months preceding my death." The will did not name a trustee. The will left all of the rest of Hank's estate to Wanda if she survived him. The will did not mention Ann. Wanda was one of two witnesses to the will. Under the law of State X, a will witnessed by a beneficiary is invalid.

In 1998, Hank and his family moved permanently to California. Hank then legally adopted Carl, Wanda's minor son by a prior marriage.

In 2001, Hank completely gave up skiing because of a serious injury to his leg and took up fishing instead. He went on numerous fishing trips over the next two years with a fellow avid fisherman, Fred.

In 2003, Hank died.

In probate proceedings, Wanda claims Hank's entire estate under the will; Ann and Carl each claim he or she is entitled to an intestate share of the estate; and Fred claims that the court should apply the doctrine of *cy pres* to make him the beneficiary of the trust.

1. Under California law, how should the court rule on:
    a. Wanda's claim? Discuss.
    b. Ann's claim? Discuss.
    c. Carl's claim? Discuss.

2. How should the court rule on Fred's claim? Discuss.

THURSDAY MORNING
JULY 29, 2004

California Bar Examination

Answer all three questions.
Time allotted: three hours

Your answer should demonstrate your ability to analyze the facts in question, to tell the difference between material and immaterial facts, and to discern the points of law and fact upon which the case turns. Your answer should show that you know and understand the pertinent principles and theories of law, their qualifications and limitations, and their relationships to each other.

Your answer should evidence your ability to apply law to the given facts and to reason in a logical, lawyer-like manner from the premises you adopt to a sound conclusion. Do not merely show that you remember legal principles. Instead, try to demonstrate your proficiency in using and applying them.

If your answer contains only a statement of your conclusions, you will receive little credit. State fully the reasons that support your conclusions, and discuss all points thoroughly.

Your answer should be complete, but you should not volunteer information or discuss legal doctrines which are not pertinent to the solution of the problem.

Unless a question expressly asks you to use California law, you should answer according to legal theories and principles of general application.

Question 4

Victor had been dating Daniel's estranged wife, Wilma. Several days after seeing Victor and Wilma together, Daniel asked Victor to help him work on his pickup truck at a nearby garage. While working under the truck, Victor saw Daniel nearby. Then Victor felt gasoline splash onto his upper body. He saw a flash and the gasoline ignited. He suffered second- and third-degree burns. At the hospital, he talked to a police detective, who immediately thereafter searched the garage and found a cigarette lighter. Daniel was charged with attempted murder. At a jury trial, the following occurred:

a. Tom, an acquaintance of Daniel, testified for the prosecution that Daniel had complained to Tom that Victor had "burned" him several times and stated that he (Daniel) would "burn him one of these days."

b. Victor testified for the prosecution that, while Victor was trying to douse the flames, Daniel laughed at him and ran out of the garage.

c. At the request of the prosecutor, the judge took judicial notice of the properties of gasoline and its potential to cause serious bodily injury or death when placed on the body and ignited.

In his defense, Daniel testified that he was carrying a gasoline container, tripped, and spilled its contents. He denied possessing the lighter, and said that the fire must have started by accident. He said that he ran out of the garage because the flames frightened him.

d. On cross-examination, the prosecutor asked Daniel, "Isn't it true that the lighter found at the garage had your initials on it?"

The prosecutor urged the jury to consider the improbability of Daniel's claim that he had accidentally spilled the gasoline.

e. During a break in deliberations, one juror commented to the other jurors on the low clearance under a pickup truck parked down the street from the courthouse. The juror measured the clearance with a piece of paper. Back in the jury room, the jurors tried to see whether Daniel could have spilled the gasoline in the way he claimed. One juror crouched under a table and another held a cup of water while simulating a fall. After the experiment, five jurors changed their votes and the jury returned a verdict of guilty.

Assume that, in each instance, all appropriate objections were made.

1. Should the court have admitted the evidence in item a? Discuss.
2. Should the court have admitted the evidence in item b? Discuss.
3. Should the court have taken judicial notice as requested in item c? Discuss.
4. Should the court have allowed the question asked in item d? Discuss.
5. Was the jury's conduct described in item e proper? Discuss.

Question 5

After working for ten years as a deputy district attorney, Lawyer decided to open her own law practice and represent plaintiffs in personal injury actions. In order to attract clients, Lawyer asked her friends and family to "pass the word around that I have opened a solo practice specializing in personal injury law."

Lawyer's brother, Bert, works as an emergency room admitting clerk at a local hospital. Whenever he admits patients who appear to be victims of another's wrongdoing, Bert gives them Lawyer's business card and suggests that they talk to her about filing a lawsuit. Each time Lawyer is retained by someone referred by Bert, Lawyer takes Bert out to lunch and gives him $500.

One such referral is Paul, who suffered head injuries when struck by a piece of heavy equipment on a construction site at Dinoworld, a local amusement park. Recently Lawyer filed a personal injury action on Paul's behalf against Dinoworld. Dinoworld's attorney immediately filed an answer to the complaint. Lawyer and Dinoworld's attorney agreed to set the deposition of the Chief Financial Officer (CFO) of Dinoworld within the next ninety days.

Lawyer's brother-in-law holds an annual pass to Dinoworld. Two weeks ago, he invited Lawyer to a special "passholders-only" event at Dinoworld, at which Dinoworld's CFO led a tour and made a presentation. At the event, Lawyer declined to wear a name tag and avoided introducing herself. She asked CFO several questions about Dinoworld's finances, and made some notes about his responses.

What ethical duties, if any, has Lawyer breached? Discuss.

Question 6

Jack owned the world's largest uncut diamond, the "Star," worth $1 million uncut, but $3 million if cut into finished gems. Of the 20 master diamond cutters in the world, 19 declined to undertake the task because of the degree of difficulty. One mistake would shatter the Star into worthless fragments.

One master diamond cutter, Chip, studied the Star and agreed with Jack in writing to cut the Star for $100,000, payable upon successful completion. As Chip was crossing the street to enter Jack's premises to cut the Star, Chip was knocked down by a slow moving car driven by Wilbur. Wilbur had driven through a red light and did not see Chip, who was crossing with the light. Chip suffered a gash on his leg, which bled profusely. Though an ordinary person would have recovered easily, Chip was a hemophiliac (uncontrollable bleeder) and died as a result of the injury. Chip left a widow, Melinda.

Jack, who still has the uncut Star, engaged Lawyer to sue Wilbur in negligence for the $2 million difference between the value of the diamond as cut and as uncut. Lawyer allowed the applicable statute of limitations to expire without filing suit.

1. What claims, if any, may Melinda assert against Wilbur, and what damages, if any, may she recover? Discuss.

2. What claims, if any, may Jack assert against Lawyer, and what damages, if any, may he recover? Discuss.

TUESDAY AFTERNOON
JULY 27, 2004

California Bar Examination

Performance Test A
INSTRUCTIONS AND FILE

DONOVAN v. BARGAIN MART, INC.

DONOVAN V. BARGAIN MART, INC.

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work: a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Ervin, Knight and Paulson
2469 East Angelo Rd., Suite 900
River City, Columbia 55551

MEMORANDUM

To: Applicant

From: Annabelle Lee

Date: July 27, 2004

RE: **Jake Donovan and Bargain Mart, Inc.**

As you know, I participate on a monthly basis at the River City Bar Association Ask-A-Lawyer night. At the last session two weeks ago, I met with Jake Donovan. He feels that he has been a victim of a scam involving a "check deferment" service provided by Bargain Mart, Inc., a local appliance store.

I need you to do some preliminary work on any potential statutory claims Mr. Donovan may have against Bargain Mart, Inc. Please prepare a memorandum that identifies the potential claims Mr. Donovan might bring against Bargain Mart, Inc.

Separately for each potential claim:

1. Set forth the statutory requirements to establish the claim;
2. Analyze whether the facts that we know establish the statutory requirements; and,
3. Identify what additional facts, if any, we must seek through investigation or discovery, and how the additional facts might help establish the particular statutory requirements.

At this point, do not discuss what remedies, such as damages or injunctive relief, might be available. We will figure out the remedies aspect at a later time.

TRANSCRIPT OF INTERVIEW BY ANNABELLE LEE OF JAKE DONOVAN

Annabelle Lee (Q): Nice to meet you, Mr. Donovan.

Jake Donovan (A): Likewise. Thanks for seeing me.

Q: Before we get started, I just want to make sure that tape-recording this conversation is okay with you.

A: It's fine.

Q: I find note taking to be distracting, so this way I just have to jot down a few notes to myself.

A: That's okay by me.

Q: A few words about myself before I turn things over to you. I am here as part of the River City Pro Bono Ask-a-Lawyer night. I am here to give you whatever advice I can about your situation, and sometimes may be able to do some further work for you, if I get permission from my firm to do so.

A: Sounds great. Thanks.

Q: So, why don't you tell me what brings you to the clinic tonight?

A: I'm embarrassed to admit it, but I think I got taken by a scam.

Q: I hope it wasn't one of those pyramid schemes.

A: No, but I should have known better. It was a rip-off. I should have trusted my instincts.

Q: Why don't you start at the very beginning?

A: I'm on a fixed income. I receive Social Security and a small pension from my years working for the State Department of Agriculture as an inspector. I had to pay a lot one month to take care of some dental bills. It left me short for the month. I get this Penny Saver weekly paper that has ads and lists sales and such. Inside was a flyer for a place called Bargain Mart. Here's a copy of the flyer if you want.

Q: Thanks, I'll take a close look at that after we're finished talking.

A: Anyway, they sell small appliances. The flyer said something about, "Come and see us if you're short on cash." I was in the neighborhood, so I stopped in. It looked like a regular store – toaster ovens, microwaves, blenders, and food processors. I asked the guy behind the counter about the flyer. He said, "You mean about being short on cash?" I said,

"Yeah." And he said that the store offered a deal where you could postdate a check, and they would give you cash that day.

Q: That sounds a little shady. Tell me more.

A: Well, it sounded shady to me, too. So I asked him how it worked. He whipped out a chart which listed amounts down the side, and number of days across the top, you know, 7, 14, 21, 28, etc. He asked me how much I needed. I told him $300. He asked how long I would need it for. I said 14 days – until I got my next checks the first of the month. He looks it up on the chart and says, "All you have to do is write us a check for $375, and show us copies of your pension checks, and fill out a form and sign it."

Q: So did you go ahead?

A: Yeah, I did. I was pretty desperate. I had to go home first to get my checkbook and a statement showing my pension amounts. I went back to Bargain Mart, wrote the check for $375, filled out the form – and they handed me $300 in cash just like that.

Q: Did you get copies of anything that you signed?

A: Yeah, I did. Here's the first agreement that I signed. And I forgot to tell you. They also gave me $75 in gift certificates to use at the store.

Q: So let me make sure I have this straight. You wrote a postdated check for $375, and in exchange they gave you $300 in cash plus $75 in gift certificates?

A: Right.

Q: What did they say about cashing the check?

A: They said that since I needed the money for 14 days, they'd wait that long to cash the check. They couldn't have cashed it anyway since it was postdated, and there wasn't enough in my account to cover it until the first of the next month.

Q: When did this happen, by the way?

A: The first time I went in was about a year ago. I've gone back a couple of times since then.

Q: When's the last time you went to Bargain Mart?

A: Well, it was actually a few days ago. I just wrote them another postdated check for $375. It'll get cashed in about 10 days.

Q: Okay. Let me take a look at the flyer and the agreement. . . . Did you ever hear anyone call this a loan?

A: Nope. In fact they specifically said it wasn't a loan since I was getting back exactly what I was giving them. But it just doesn't seem right, you know what I mean?

Q: I know. Did you ever try to use the gift certificates?

A: No. But the stuff in the store was really expensive – even the used stuff.

Q: You said that the person behind the counter showed you a chart – did he give you a copy?

A: No, he didn't.

Q: What would've happened if your check had bounced?

A: Well, that actually happened once. I had to pay a $25 returned check fee, then had to write another postdated check – this time for $500 -- $400 to cover the amount I owed, and I got $100 in additional gift certificates.

Q: So let me get this straight. For that last transaction, you'd originally written a check for $375 and gotten back $300 cash and $75 in gift certificates?

A: That's right.

Q: And then when they tried to cash the check a couple of weeks later, it bounced. You went back to Bargain Mart and now you owed them $375 plus a $25 returned check fee. So that totals $400. On their handy chart, in order to get $400 to pay off the debt, you had to postdate another check for $500 and got another $100 gift certificate?

A: You've got it. That's exactly what happened.

Q: Let me do a quick calculation here. . . . Putting aside the gift certificates, if this was a straight loan, that's a 650% annual percentage rate!

A: How did you figure that?

Q: Well, $75 is 25% of the $300 that you borrowed. The term was two weeks, which is 1/26 of a 52-week year. And 25% times 26 is 650%. I'd call that pretty high interest. And it's 650% interest for the second transaction, too.

A: I told you I thought something wasn't right.

Q: Well, Mr. Donovan, this sounds very interesting. I'd like to do some further investigation of how Bargain Mart operates. Do you have any idea who else I might talk to?

A: Funny you should ask. I met this kid not too long ago who said he used to work there. His name is Larry Walker. I see him around all the time. Shall I just have him give you a call?

Q: That would be great. Here's my card. Just have him ask for me. And here's a card for you. I'll let you know what we come up with, Mr. Donovan. You should feel free to call me if you think of anything else. I'll get back to you before that last check will get cashed, okay?

A: Thanks a lot. I really appreciate your time.

*** * END OF INTERVIEW * ***

EXCERPTS FROM INTERVIEW BY ANNABELLE LEE OF LARRY WALKER

Annabelle Lee (Q): Mr. Walker, we got your name from Jake Donovan.

Larry Walker (A): Yes, I know. Jake told me that you wanted to talk to me about Bargain Mart.

Q: That's right, and if you could just confirm for me that you are agreeing to this tape recording, that'd be great.

A: It's fine. I agree to the tape recording.

Q: So, Mr. Walker, when did you work at Bargain Mart?

A: I worked there about 3 years ago for about 8 months.

Q: What did you do there?

A: I worked behind the counter.

Q: What did your job consist of?

A: I would help customers who wanted to use either our "cash-plus" service or buy an appliance.

Q: Tell me about the cash-plus service.

A: The idea was that people would get cash from us in exchange for writing a check for a higher amount. I had a chart at the counter that would tell me how much more the check had to be. Oh, and the check was postdated. So let's say the customer needed $500. My chart said $125. So, the customer would write a check for $625 and get cash of $500 that day. In addition, they'd get gift certificates for the $125 premium.

Q: Did people ever use their gift certificates?

A: I never saw it. I mean, why would you? You can get the same stuff across the street at Smitty's for a lot less. The appliances were really overpriced and pretty junky.

Q: Can you give me an example?

A: Well, I can't remember exactly, but say, a toaster oven was for sale for $150, and you could only pay for half of it with gift certificates.

Q: So, to buy the $150 toaster oven you would have to pay with a $75 gift certificate, plus another $75 in cash?

A: Yeah, and even $75 was more than you'd pay for the same thing at other places like Smitty's.

Q: Did you receive any sort of training for the cash-plus service?

A: Yeah, my boss told me never to use the word "loan," because the customers were getting full value in the form of gift certificates.

Q: Did you have the customers fill out any forms?

A: Yeah, there was a standard agreement that everyone signed.

Q: Did you do any credit checks on anyone?

A: Nope. All they had to show us was proof of regular monthly income – a job, pension, Social Security, whatever.

Q: So, you said the appliances were overpriced. Did anyone come in just to buy appliances?

A: I never saw any, but I wasn't the only one who worked there and that was three years ago.

* * *

BARGAIN MART, INC.

AGREEMENT

NATURE OF SERVICES PROVIDED. I understand that Bargain Mart, Inc. (BMI) provides "cash-plus" services only. BMI is not in the loan business. In exchange for BMI's giving me cash of $ 300.00 and gift certificates worth $ 75.00, I will write a postdated check in the amount of $ 375.00 which BMI will not cash until 14 days from the date I sign this agreement.

RETURNED TRANSACTIONS. In the event that any check that I have signed is returned unpaid to BMI: (1) I agree to pay a returned check charge of $25.00; (2) in the event that BMI initiates collection activity on my account, I agree to be responsible for collection fees, court costs and fees, and all reasonable attorney fees; (3) I authorize BMI to initiate debits to my bank account in amounts up to the amount I owe, until the amount I owe is paid in full; and, (4) I understand and agree that I may be subject to criminal prosecution and civil penalties for writing "bad" checks under applicable laws.

GOVERNING LAW. I agree that the laws of the State of Columbia will apply to this and any transactions I enter into with BMI.

I have read the foregoing agreement, understand its terms, and am voluntarily entering into this arrangement.

Date: July 25, 2003

Jake Donovan
Customer

112 2nd St., River City, Col.
Address

BARGAIN MART – YOUR ONE-STOP BARGAIN CENTER

IF YOU'RE IN THE MARKET FOR GOOD DEALS ON SMALL APPLIANCES, COME SEE US AT BARGAIN MART. WE MAY BE ABLE TO HELP.

WE STOCK A LARGE SUPPLY OF SMALL APPLIANCES. CHECK OUT OUR PRICES– THEY CAN'T BE BEAT.

IF YOU'RE SHORT ON CASH OR DON'T HAVE GOOD CREDIT, WE ALSO OFFER CASH-PLUS SERVICES.

IF YOU NEED CASH BEFORE YOUR NEXT PAYDAY, YOU CAN WRITE US A CHECK FOR THE AMOUNT YOU NEED AND WALK AWAY WITH IMMEDIATE CASH. COME SEE US FOR DETAILS.

WE LOOK FORWARD TO WORKING WITH YOU!!!

TUESDAY AFTERNOON
JULY 27, 2004

California
Bar
Examination

Performance Test A
LIBRARY

DONOVAN v. BARGAIN MART

LIBRARY

Table of Contents

SELECTED COLUMBIA CODE PROVISIONS

INTEREST AND USURY STATUTES

Civil Code § 3601. Legal Interest Rate—Agreement for Higher Rate

(a) The legal rate of interest shall be 10 percent per year (or 10% annual percentage rate or APR) where the rate of interest is not established by written contract. Notwithstanding the provisions of other laws to the contrary, the parties may establish by written contract any rate of interest, expressed in annual percentage rate or APR terms as of the date of the evidence of the indebtedness, and charges and any manner of repayment, prepayment, or acceleration.

(b) Where the principal amount involved is $3,000.00 or less, the legal rate of interest shall not exceed 20 percent per year (or 20% annual percentage rate or APR) on any loan, advance, or forbearance to enforce the collection of any sum of money unless the loan, advance, or forbearance to enforce the collection of any sum of money is made pursuant to another law.

Civil Code § 3602. Civil Penalty for Charging Excessive Interest-- Usury

The taking, receiving, reserving, or charging a rate of interest greater than the amount allowed by § 3601, when knowingly done, shall be unlawful. The creditor is prohibited from recovering any interest on loans when an interest rate greater than is allowed by § 3601 is charged. Where a rate of interest greater than is allowed by § 3601 has been paid, the person by whom it has been paid, or his legal representatives, may recover all of the interest thus paid from the creditors taking or receiving the same. In addition, the person or legal representatives may recover an additional amount equal to all of the interest paid as a penalty.

* * *

CHECK-CASHING AND DEFERRED-DEPOSIT SERVICES

Civil Code § 3701. Definitions

As used in this chapter:

(1) "Check" means any check, draft, money order, personal money order, travelers' check, or other demand instrument for the transmission or payment of money.

(2) "Consideration" includes any premium charged for the sale of goods or services in excess of the cash price of the goods or services.

(3) "Deferred deposit transaction" means, for consideration, accepting a check and holding the check for a period of time prior to deposit or presentment in accordance to an agreement with or any representation made to the maker of the check, whether express or implied.

(4) "Deferred deposit service business" means a person who engages in deferred deposit transactions.

(5) "Department" means the Department of Financial Institutions.

(6) "Licensee" means a person duly licensed by the Department to conduct the business of cashing checks or accepting deferred deposit transactions.

(7) "Person" means any individual, partnership, association, joint stock association, trust, corporation, or other entity, but shall not include the United States government or the government of this State.

Civil Code § 3702. Requirement of License

Except as provided in § 3703, no person shall engage in the business of cashing checks or accepting deferred deposit transactions for a fee or other consideration without having first obtained a license.

Civil Code § 3703. Exemptions from Applicability of §§ 3701 to 3712

The provisions of §§ 3701 to 3712 shall not apply to:

(1) Any bank, trust company, savings and loan association, savings bank, credit union, consumer loan company, or industrial loan corporation which is chartered, licensed, or organized under the laws of this State or under federal law and authorized to do business in this State;

(2) Any person who cashes checks without receiving, directly or indirectly, any consideration or fee therefor; and

(3) Any person principally engaged in the retail sale of goods or services who, either as an incident to or independently of a retail sale, may from time to time cash checks for a fee or other consideration.

Civil Code § 3705. Procedures to be Followed by Licensees

* * *

(2) Any fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest. A licensee shall not charge a service fee in excess of fifteen dollars ($15) per one hundred dollars ($100) on the face amount of the deferred deposit check. A licensee shall prorate any fee, based upon the maximum fee of fifteen dollars ($15). This service fee shall be for a period of fourteen (14) days.

* * *

(8) No licensee shall engage in unfair or deceptive acts, practices, or advertising in the conduct of the licensed business.

(9) No licensee who enters into a deferred deposit transaction with an individual shall prosecute or threaten to prosecute an individual for writing a bad check.

(10) Each licensee shall conspicuously display in every deferred deposit business location a sign that gives the following notice: "No person who enters into a postdated check or deferred deposit check transaction with this business establishment will be prosecuted for or convicted of writing bad checks."

Civil Code § 3708. Requirements of Disclosure by Licensees -- Fees and Service Charges -- Acceptance, Payment, and Deposit of Checks

(1) Each licensee who engages in deferred deposit transactions shall give the customer the disclosures required by the Consumer Credit Protection Act (15 U.S.C. § 1601). Proof of this disclosure shall be made available to the department upon request.

(2) Each licensee shall conspicuously display a schedule of all fees, and charges for all services provided by the licensee that are authorized by §§ 3701 to 3712. The notice shall be posted at the office and every branch office of the licensee.

(3) A licensee may charge, collect, and receive check collection charges made by a financial institution for each check returned or dishonored for any reason, provided that the terms and conditions upon which check collection charges will be charged to the customer are set forth in the written disclosure.

(4) Any personal check accepted from a customer must be payable to the licensee.

(5) Before a licensee shall present for payment or deposit a check accepted by the licensee, the check shall be endorsed with the actual name under which the licensee is doing business.

Civil Code § 3720. Enforcement by Department of Financial Institutions and Attorney General

The provisions of §§ 3702 through 3708 shall be enforced exclusively by the Department of Financial Institutions. Actions for any violations of these provisions shall be prosecuted exclusively by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia.

* * *

UNFAIR BUSINESS PRACTICES ACT

Business and Professions Code § 17200. Definition

As used in this chapter, “unfair competition” shall mean and include any unlawful,

unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising.

* * *

Business and Professions Code § 17203. Remedies and Jurisdiction

Any person who engages, has engaged, or proposes to engage in unfair competition may be enjoined in any court of competent jurisdiction. The court may make such orders or judgments, including the appointment of a receiver, as may be necessary to prevent the use or employment by any person of any practice which constitutes unfair competition, as defined in this chapter, or as may be necessary to restore to any person in interest any money or property, real or personal, which may have been acquired by means of such unfair competition.

Business and Professions Code § 17204. Actions for Relief; Prosecutors

Actions for any relief pursuant to § 17203 shall be prosecuted by the Attorney General or any district attorney or city attorney in the name of the people of the State of Columbia; or upon the complaint of any person acting for the interests of him or herself, or the general public.

SELECTED FEDERAL CODE PROVISIONS

THE CONSUMER CREDIT PROTECTION ACT

15 U.S.C. § 1601 Congressional Findings and Declaration of Purpose

(a) It is the purpose of this title to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices.

* * *

15 U.S.C. § 1602 Definitions and Rules of Construction

*** * ***

(e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.

(f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise, consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

*** * ***

15 U.S.C. § 1605 Determination of Finance Charge

(a) "Finance charge" shall be determined as the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:

(1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges;

(2) Service or carrying charge;

(3) Loan fee, finder's fee, or similar charge; and

(4) Fee for an investigation or credit report.

Hamilton v. HLT Check Exchange, LLP

Columbia Court of Appeal (1997)

Defendant HLT Check Exchange, LLP ("HLT"), has appealed an order denying its motion to dismiss plaintiffs' claims.

The following are the pertinent facts. On August 22, 1996, the Hamiltons began doing business with HLT, a licensed check cashing company, in Pikeville, Columbia. The Hamiltons engaged in two types of transactions with HLT: (1) "check cashing" transactions, and (2) "deferral" transactions.

The following is how the "check cashing" transactions worked. The Hamiltons would give HLT a document in the form of a check in exchange for cash. HLT agreed to hold the "check" for two weeks before presenting it for payment or before requiring the Hamiltons to "pick up" the check by paying the face amount. HLT's charge for cashing and holding the check for two weeks was 20% of the sum advanced. The Hamiltons incurred the 20% charge for the use of HLT's money and the ability to delay the payment of the check.

In the "deferral" transactions, upon the expiration of two weeks, HLT would allow the Hamiltons to defer presentment of their check in exchange for an additional 10% of the sum originally advanced for each week of deferral. The "deferral" fees were incurred by the Hamiltons in order to have more time to pay off their original "check." The Hamiltons allege that HLT knew or reasonably should have known that at the time of the "check cashing" and "deferral" transactions that they did not have sufficient funds in the bank to cover the checks given to HLT. Based on the above facts, the Hamiltons have made numerous claims against HLT, and HLT moved to dismiss all of them. The trial court denied the motion.

The applicable law on motions to dismiss is as follows: (1) A complaint should not be dismissed unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief; and, (2) A complaint need only give 'fair notice' of what the plaintiff's claim is and the grounds upon which it rests.

One of the Hamiltons' first claims involves Columbia's Interest and Usury Statutes, Civil Code §§ 3601, et seq. In order to state a claim under Civil Code § 3602, a person must knowingly take, receive, reserve, or charge a rate of interest greater than is allowed in CC § 3601. Based on the above facts, the Hamiltons claim that HLT charged a 520% annual simple interest rate (10% per week times 52 weeks per year), which more than exceeds the rate allowed in Civil Code § 3601.

HLT, relying heavily on the check cashing statutes, argues that it was not charging interest but only service fees for cashing checks. The pertinent check cashing provision, Civil Code § 3705(2), states that "[a]ny fee charged by a licensee for cashing a check shall be disclosed in writing to the bearer of the check prior to cashing the check, and the fee shall be deemed a service fee and not interest."

The Hamiltons, however, argue that their "check cashing" and "deferral" charges were incurred in exchange for extra time to pay back their original check, not fees for cashing a check.

In analyzing this issue, we note that the greed of lenders, and the willingness of borrowers to concede whatever may be demanded or to promise whatever may be exacted in order to obtain temporary relief from financial embarrassment, as would naturally be expected, have resulted in a great variety of devices to evade the usury laws; and to frustrate such evasions the courts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible

rule that the mere form is immaterial, but that it is the substance which must be considered. No case is to be judged by what the parties appear to be or represent themselves to be doing, but by the transaction as disclosed by the whole evidence; and, if from that it is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money, the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings.

In looking at the substance of the transactions between the Hamiltons and HLT, as opposed to the form, the Court finds that the transactions were nothing more than interest bearing loans. HLT was not cashing the Hamiltons' checks, but rather it was giving them short-term loans that could be deferred for an additional 10% per week.

It also seems clear that Civil Code § 3705(2) was written so there would be no confusion that if a person walked into a check cashing establishment with a government check for $1,000 and the business gave him $900 for the check that the business would not be subject to usury statutes because the $100 payment would be a service fee, not discounted interest. The above $100 charge is considered a service fee because the business is not receiving the $100 for the use of its money, but rather the service of processing and providing instant cash to people who don't have access to bank services.

Moreover, a well-known legal dictionary defines "loan" as "delivery by one party to and receipt by another party of a sum of money upon agreement, express or implied, to repay it with or without interest." *Black's Law Dictionary* 844 (5th ed. 1979). It goes on to define "interest" as "the compensation allowed by law or fixed by the parties for the use or forbearance or detention of money." Id. at 729. Based on the above definitions, it is clear that the charges incurred by the Hamiltons were interest from short-term loans, not service fees.

The Hamiltons also assert claims under the Columbia's Unfair Business Practices Act (UBPA). The UBPA is a broad, remedial act which confers a right of action, in equity, to enjoin unfair, deceptive and/or fraudulent business acts or practices. The goal of the UBPA is intended to address the general societal harm that results when business enterprises act illegally or unethically. In order to state a claim under the UBPA, plaintiff must allege that defendant engaged in unlawful, unfair, or fraudulent business acts or practices; or unfair, deceptive, untrue or misleading advertising. Business and Professions Code section 17200. The factors which the courts consider in determining whether a practice is unfair are: whether the practice violates or offends public policy as it has been established by statutes, the common law, or otherwise; whether it is immoral, unethical, oppressive, or unscrupulous; and whether it causes substantial injury to consumers. Here, the Hamiltons allege that HLT disguised their consumer loan business as a check cashing operation, failed to disclose their interest rates and finance charges, threatened criminal prosecution for writing bad checks when HLT had to have known that the Hamiltons could not have been prosecuted for failing to pay usurious loans, and violated Civil Code provisions pertaining to check-cashing businesses. If proved, these practices constitute actionable unfair business practices under the UBPA.

HLT asserts that a UBPA claim cannot be based upon violations of licensing requirements under Civil Code §§ 3702-3708. HLT argues that the Hamiltons have no standing to seek relief for violations of licensing statutes, that being the exclusive purview of the State. Therefore, the Hamiltons lack standing to raise these statutory violations as a basis for a UBPA claim. This argument lacks merit as it ignores the broad mandate of the UBPA. The courts will look to the underlying conduct engaged in by the business. If that conduct is unlawful, unfair, deceptive, or fraudulent, a UBPA claim can be based upon that conduct notwithstanding the plaintiff's lack of standing to seek direct relief for violations of the law.

In regard to the claims under the federal Consumer Credit Protection Act ("CCPA"), 15 U.S.C. § 1601, et seq., it is clear that the Hamiltons have alleged sufficient facts to state a claim. CCPA is a comprehensive regulatory scheme intended to deter the predatory extension of credit which can disrupt the national economy and increase the personal bankruptcy rate. Its provisions are intended to aid the unsophisticated consumer in determining the total costs of financing. One of its primary mechanisms for accomplishing this is the requirement of "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit, and to protect the consumer against inaccurate and unfair credit billing and credit card practices." 15 U.S.C. § 1601(a). The consumer must receive, in writing, the finance charge (a dollar amount) and the annual percentage rate or APR (the cost of credit on a yearly basis). Because CCPA is a remedial act designed to protect consumers, courts construe it liberally in favor of consumers. They focus on the substance, not the form, of credit-extending transactions.

The Hamiltons allege that the defendant failed to disclose the terms of their transactions, such as the 520% annual rate, in the manner required by CCPA. The defendant argues that it did not have to conform to CCPA because the transactions were not covered by the statute. This argument ignores the nature of the deferred-repayment transactions and does not reflect the broad wording of CCPA or its underlying policy.

For example, 15 U.S.C. § 1602 states that:

> (e) The term "credit" means the right granted by a creditor to a debtor to defer payment of debt or to incur debt and defer its payment.
>
> (f) The term "creditor" refers only to a person who both (1) regularly extends, whether in connection with loans, sales of property or services, or otherwise,

> consumer credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, and (2) is the person to whom the debt arising from the consumer credit transaction is initially payable on the face of the evidence of indebtedness.

Furthermore, 15 U.S.C. § 1605(a) broadly defines "finance charge" as:

> the sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit. Examples of charges which are included are:
>
> (1) Interest, time price deferential, and any amount payable under a point, discount, or other system of additional charges;
>
> (2) Service or carrying charge;
>
> (3) Loan fee, finder's fee, or similar charge; and
>
> (4) Fee for an investigation or credit report.

The deferred-repayment transactions between the Hamiltons and HLT involved payments by the Hamiltons of substantial sums of money over time for the privilege of obtaining cash from HLT today. Thus, since the Hamiltons were incurring debt and deferring its payments, these transactions would fall under the language in 15 U.S.C. § 1602(e) and (f). Additionally, the alleged fees paid by the Hamiltons to the defendant would be considered finance charges under the broad definition in 15 U.S.C. § 1605(a).

Affirmed.

Pilot Life Insurance Company v. Sledd

Columbia Court of Appeal (1975)

This is an appeal from a judgment finding that certain charges appellant Robert Sledd (Sledd) was required to incur in connection with a loan were not interest payments and therefore not subject to Columbia's usury statute.

Sledd borrowed money from Pilot Life Insurance Company (Pilot). As a condition of the loan, Pilot required Sledd to purchase credit-life insurance. Sledd purchased the insurance from Pilot, but he could have met the requirement by purchasing insurance from any reputable insurer doing business in this State. When Pilot sued Sledd to enforce the loan, Sledd interposed a defense alleging that the loan was unenforceable because it provided for payment of a usurious interest rate. Sledd alleged that by requiring him to purchase credit-life insurance as a condition of receiving the loan, the payment of the insurance premium amounted to a demand for excessive interest in violation of the state's usury laws.

Usury is the excess over the legal interest charged by a lender to a borrower for the use of the lender's money. It is the reserving and taking or contracting to reserve and take, either directly or indirectly, by commission, discount, exchange, advances, or by any contract or contrivance whatever, a greater sum for the use of money than the lawful interest, the legal rate being 10 percent, and it being usury to charge more than 10 percent. Civil Code § 3601.

However, where an excess over the legal interest is paid for other good and valuable considerations beyond the mere use of money, it is not usury. The substance of Sledd's claim was that the usury consisted of Pilot requiring that he procure a credit-life insurance policy, on his life or on the life of some other person, offered by some reputable life insurance company doing business in this State, and assign it as collateral security for the loan. Sledd purchased the policy, which was issued by Pilot, a reputable

life insurance company doing business in this State. Sledd asserts that the premium charged for the insurance by Pilot as a life-insurance company in connection with the interest charged, which was 6 percent per annum, was in excess of the legal rate of interest, and made the contract usurious. The premium charged did not inure to the benefit of Pilot, as such, but was the consideration charged and earned by it as a life insurance company. There was therefore no violation of the principle that anything given in excess of legal interest which inures to the benefit of the lender will be considered usury.

Sledd contends that the premium should be included as interest because the credit-life insurance was of no value to him. The beneficiary of the policy was Pilot, and the amount of the policy covered only the amount of the loan. Thus, Sledd argues that he received nothing of value, and that the policy was, in effect, a payment to protect the interest of the lender. It is to be noted that Sledd was not required to take out the insurance with Pilot, but only with some reputable insurance company doing business in this State; that less than the maximum rate of 10% interest was charged on the loan; and that the premium charged was not alleged to be more than was customarily charged non-borrowers for similar insurance coverage.

Judgment affirmed.

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
INSTRUCTIONS AND FILE

JAYNES v. PALM GARDENS GROUP

JAYNES V. PALM GARDENS GROUP

INSTRUCTIONS

1. You will have three hours to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.
2. The problem is set in the fictional State of Columbia, one of the United States.
3. You will have two sets of materials with which to work, a **File** and a **Library**.
4. The **File** contains factual materials about your case. The first document is a memorandum containing the instructions for the tasks you are to complete.
5. The **Library** contains the legal authorities needed to complete the tasks. The case reports may be real, modified, or written solely for the purpose of this performance test. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read each thoroughly, as if it were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the **Library**, you may use abbreviations and omit page citations.
6. Your response must be written in the answer book provided. You should concentrate on the materials provided, but you should also bring to bear on the problem your general knowledge of the law. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the **File** and **Library** provide the specific materials with which you must work.
7. Although there are no restrictions on how you apportion your time, you should probably allocate at least 90 minutes to reading and organizing before you begin writing your response.
8. Your response will be graded on its compliance with instructions and on its content, thoroughness, and organization.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

MEMORANDUM

To: Applicant

From: Daniel Spitz

Date: July 29, 2004

Re: **Jaynes v. Palm Gardens Group**

Our firm represents Lydia Jaynes, a tenant at Palm Gardens Apartments, in a negligence claim against Palm Gardens Group (Palm). Ms. Jaynes was assaulted and seriously injured by an unknown male assailant in the parking garage at Palm Gardens Apartments. She has filed a lawsuit against Palm for negligent failure to repair a broken security gate in the parking garage.

Palm has filed a Motion for Summary Judgment. Please draft plaintiff's responsive memorandum of points and authorities opposing the granting of that summary judgment motion. In discussing the facts, assume that the documents in the file will be presented to the court in the form of declarations and exhibits. At this point, simply identify the source of any facts to which you refer.

Molina, Spitz and Carter
3400 E. Lansing Blvd., Suite 900
Phillipstown, Columbia 88888
(555) 894-0900

To: Firm Associates

Re: Memoranda in Opposition to Motions for Summary Judgment

A Memorandum of Points and Authorities in Opposition to a Motion for Summary Judgment consists of three sections, as follows:

SECTION I. *Introduction.* Write a concise summary of the nature of the underlying case, the basis for the summary judgment motion and the basis for the opposition.

SECTION II. *Response to Moving Party's Arguments.* The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our position. Authority supportive of our position should be emphasized, but contrary authority should generally be cited, addressed in the argument, and explained or distinguished. Given the nature of summary judgment, it is imperative that there be reference not only to the existence of relevant facts, but where those relevant facts can be found in the record. To the extent that factual material has yet to be reduced to a form appropriate for presentation to the court (e.g., a witness statement has not been converted to a declaration), you may simply identify the source of any factual material to which you refer.

The firm follows the practice of writing carefully crafted subject headings that illustrate the arguments they cover. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or statement of an abstract principle. For example, *Improper:* PLAINTIFF HAS ESTABLISHED A TRIABLE ISSUE OF FACT AS TO DAMAGES. *Proper:* NOTES BY A

TREATING PHYSICIAN ARE SUFFICIENT TO ESTABLISH A TRIABLE ISSUE OF FACT AS TO PLAINTIFF'S DAMAGES.

SECTION III. *Conclusion.* This is a brief statement asking the court to find in our client's favor.

Paul Price
HIMMLER & MATZEN
1 West Union Plaza, 15th Floor
Garden City, Columbia
(555) 267-0001

Attorneys for Defendant

SUPERIOR COURT OF THE STATE OF COLUMBIA

IN AND FOR THE COUNTY OF SCHYLER

LYDIA JAYNES,

Plaintiff,

vs.

PALM GARDENS GROUP,

Defendant.
_____/

Case No. 171757

MEMORANDUM OF POINTS AND AUTHORITIES SUPPORTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Defendant Palm Gardens Group owns apartment complexes including the Palm Gardens Apartments. Plaintiff Lydia Jaynes alleges she was assaulted and injured by an unknown assailant in the parking garage at Palm Gardens Apartments. She has sued defendant for negligent failure to repair a broken security gate in the parking garage and to provide adequate security measures.

II. PLAINTIFF HAS FAILED TO PRESENT EVIDENCE SUFFICIENT TO SHOW THERE IS A TRIABLE ISSUE OF MATERIAL FACT ON THE ELEMENT OF CAUSATION.

In *Putnam v. Winters Group*, the Columbia Supreme Court upheld a lower court's granting of a motion for summary judgment finding that the plaintiff had not established and could not reasonably expect to establish a *prima facie* case of causation. As in *Putnam*, plaintiff in the instant case has brought forth merely evidence of the "speculative possibility" that additional actions on the part of defendant "might have prevented the assault."

III. PLAINTIFF HAS NOT ESTABLISHED, AND CANNOT REASONABLY EXPECT TO ESTABLISH, A *PRIMA FACIE* CASE FOR CAUSATION.

Plaintiff has failed to present any evidence beyond mere speculation to support her claim for causation. Indeed, fundamental reasonable possibilities for causation have not been foreclosed. For example:

Plaintiff has offered no evidence showing the identity of her assailant;

Plaintiff has offered no evidence showing when the security gate was broken;

Plaintiff has offered no evidence that the assailant entered through the gate, much less when the gate was broken;

Plaintiff has offered no evidence that the assailant broke the gate himself;

Plaintiff has offered no evidence that defendant reasonably or effectively could have warned tenants of unspecified dangers from unknown assailants frequenting the garage.

//

//

//

//

IV. CONCLUSION

For the above stated reasons, defendant respectfully requests this court grant summary judgment in favor of Palm Gardens Group.

Respectfully submitted,

HIMMLER & MATZEN

Dated: July 14, 2004

Paul Price

By: PAUL PRICE

MOLINA, SPITZ, and CARTER

MEMORANDUM

To: Applicant

From: Daniel Spitz

Below is the draft declaration of our client, Lydia Jaynes, prepared from the transcript of her initial interview. We will add the case caption and title, and have it signed before appending it to our response.

DECLARATION OF LYDIA JAYNES

I, Lydia Jaynes, declare as follows:

1. I rented my apartment at Palm Gardens Apartments in late 2001 because I wanted a secure building with controlled access.

2. I saw a newspaper advertisement for Palm Gardens Apartments which stated that it was a secure building.

3. The apartment building is small, with ten 2-bedroom apartment units over a parking garage with 12 parking spaces.

4. When I visited the apartment building I was shown the various security features of the building.

5. I was also assured by the building's managers that this particular apartment building had several security features, including underground parking secured by an automatic gate which required an access card for entry (the standard sort of iron gate that rises up from the ground to permit a car to enter, then closes after the car has entered).

6. In addition to the security gate, there were three other pedestrian gates or doors

leading from the parking garage. Two gates exited to a patio area of the apartment building. The third was a door leading to the elevator which ran between the garage and the apartment building.

7. These gates and the door require keys to unlock them, and the keys are provided only to current tenants.

8. Since the Fall of 2002, there has been a serious problem with the automatic gate to the parking garage. It would usually stick open, and it was often not repaired.

9. On at least three different occasions in late 2002 and early 2003, I complained to the manager that the security gate was not closing properly. Other tenants complained as well.

10. In approximately January or February 2003, a car ran into the gate and, from that time on, the gate never worked properly, and often left a three-foot space between the ground and the bottom of the gate.

11. I arrived home at about 2 a.m. on June 15, 2003, and used my security access card to enter the apartment building's underground garage. When I arrived, the gate was partially stuck open, with about a 2 to 3 foot gap between the bottom of the gate and the garage floor.

12. I drove down the ramp and pulled into my parking space. As I got out of my car, I was attacked by a man. He grabbed me by the throat, beat me, and sexually assaulted me. He fled out through the partially open security gate.

13. I did not recognize the man who attacked me. The man wore a mask and did not say or do anything that enabled me to identify him.

14. I am quite sure that the attacker was not any of the male tenants living in the apartment building. I know them all and would have been able to recognize any of the tenants if he had been the assailant.

I declare under penalty of perjury under the laws of the State of Columbia that the foregoing is true and correct. Executed on _____ in Phillipstown, Columbia.

_____
Lydia Jaynes

Ripka International Investigative Report

To: Molina, Spitz, and Carter

From: John Ripka, Ripka International

You have asked me to conduct an investigation as to the assault of Lydia Jaynes at Palm Gardens Apartments. In addition, you asked me to interview the other apartment tenants. I have also examined the incidence of crime at the Palm Gardens Apartments and its immediate surroundings.

First, I got a feel for the neighborhood. I drove around the area surrounding the apartment complex several times, both during the day and in the evening. Generally, the area is residential, about a mile or so from the downtown business district. The residents are diverse ethnically. It struck me as a lower-to-middle class area based on the relatively high percentage of multi-family housing; the type of cars parked on the street; relatively small single-family homes on smaller lots, etc.

I looked into crime demographics through reports done by the Brookminster Police Department. Palm Gardens is located in a moderate crime area. I say this because the district ranked 35th out of 59 districts in Brookminster in terms of overall crime rates. I also reviewed the police report; the repair logs kept by the apartment manager; the logs kept by the security gate service company; and building permit records.

I inspected the premises, specifically the parking lot and its immediate surrounding area. I did this both during the day and at night; also during the week and over a weekend. It seems clear to me that the building was designed to be a security building in that there were wrought iron security gates installed in the garage in or about 1987. The building was designed as a security complex to attract tenants to the building as opposed to some other building that didn't have those security amenities. I examined the security gates – both the

car gate and the pedestrian gates.

I interviewed police Captain Richard Snyder. He informed me that the Palm Gardens is located in a low to moderate crime area of the City of Brookminster. Over the last five years, there have been some, but not many, incidents of crimes of the person (assault, battery, robbery). Incidents of property crimes (burglary, theft, vandalism) are somewhat more frequent. Captain Snyder also said that there have been no reported incidents involving violent behavior by tenants of Palm Gardens or their guests.

According to Captain Snyder, in assault cases typically the assailant will have cased the location in advance, will know where the escape routes are and will wait for the victim to come to him or provide the opportunity for him to attack the victim. The fact that the assailant attacked Ms. Jaynes in the parking structure as she exited her vehicle suggested to Captain Snyder that the assailant knew, either from prior experience or prior time at this location, that he would be undisturbed during that period of time, that there was a very small chance of being observed by anyone, and that he would have an excellent ability to escape, if necessary. He may have selected this location because of the conditions that he found, such as an open gate providing him access, the isolated, remote nature of the structure, the opportunities to hide, and escape routes out of the building. Snyder thinks they all contributed to the selection of this particular building and the attack on Ms. Jaynes.

From the time Ms. Jaynes moved in until the time she was assaulted, there were no other assaults or violent crimes in the garage, but there were three auto break-ins in the garage reported to the police during that period, as well as a number of incidents of vandalism involving smashing of windshields and slashed tires. These incidents occurred when the security gate was broken.

The nature of the parking structure being underground or below the building, and being remote and isolated, provided a potentially hazardous environment for people that would have to drive in underground, essentially, and park there at night, unless the security gates

were properly functioning. The facts of this case seem to indicate that the security gate to the garage was defective on the evening of Ms. Jaynes' assault in that it would not fully close and allowed the assailant to gain access to the parking structure and lie in wait for Ms. Jaynes to pull into her parking space. For the months immediately preceding the assault, there was no one on site on a daily basis in a management capacity to inspect, test, receive tenant complaints or respond to any defects that might have existed in the security gates. I think that had someone been on the premises acting in that capacity, they would have become aware of the defective condition of the gate and had an opportunity to make the repair.

I have reviewed the repair logs maintained by Palm Gardens. The relevant excerpts are attached. These logs record complaints about items needing repair at the Palm Gardens. There are 7 reports of tenant complaints about the security gate not closing properly between November 2002 through May 2003. The log indicates that calls to the repair company were made in six out of seven times within 24 hours of the date and time of the complaint.

The last tenant complaint prior to Ms. Jaynes' assault occurred on May 27, 2003. However, there was a service call made by the repair company on June 5, 2003. The service call report indicates that the gate was stuck open, and that the repair person adjusted the gate and got it in proper working order. The gate should have been maintained on a regular basis by someone trained and skilled in repairing the gates.

I also interviewed all of the other tenants. There are nine other tenant families in the building besides Ms. Jaynes. Three of the tenants are women living alone; two are single women with children; two are married couples, one with a child, who claim to have been home with their families all evening; and the two other tenants are single males. All five of the teenage and adult males living in the complex claim to have been asleep in their apartments at the time of the attack. All of the tenants denied having male guests that evening.

One of the tenants, Kuryakin Burris, said that she came home around 4 p.m. on the afternoon before the assault, and the gate was again stuck open. She tried several times unsuccessfully to get it to close. She did not report it to the apartment manager because, she said, it always seemed to be broken.

The owners of the Palm Garden Apartments own and operate six similarly sized apartment buildings. The other five are within a mile of the Palm Gardens Apartments. This means that they could have employed a guard service, or individual guard, to patrol the buildings. Either the guard service or the individual guard might have prevented or stopped this assault, or at least deterred it from occurring in the first place.

Thank you for the opportunity to conduct this investigation for you.

RIPKA INTERNATIONAL

John Ripka

John Ripka

Narrative Section from Crime Scene Investigation Report Prepared by Brookminster Police Department

I responded to a call from the responding officer Petrillo at 0300 hours on June 15, 2003. Officer Petrillo requested that I conduct a crime scene investigation. I drove to the apartment complex known as Palm Gardens Apartments. I parked on the street and approached the parking garage. The security gate was open; the bottom of the gate was about 2 feet above the floor of the garage. I examined the security gate with my flashlight and did not observe any signs of forced entry to the gate. I examined the two pedestrian gates leading from the garage to the patio area of the complex. Both of these gates were securely closed, and appeared to be in good working order. I also examined the door leading from the garage to the apartment building. This door was also securely shut and appeared to be in good working order.

Supplemental Report dated June 19, 2003

After the incident, I submitted a list of names and dates of birth of the adult and teenage males living at Palm Gardens Apartments to State Records and Investigations. SR&I reported that none had a record of any arrests or convictions.

Elroi Samuels

Elroi Samuels

Maintenance and Repair Log

[redacted to show only reports pertaining to Palm Gardens Apartments]

Date	Repair request and response
November 15, 2002	Lydia Jaynes called to say that security gate would not close all the way
November 16, 2002	Call placed to Securite Company; will send repair person within 12 hours
November 17, 2002	Securite adjusted and repaired gate
December 10, 2002	Martha Taylor called to report security gate didn't close
December 10, 2002	Call placed to Securite Company; will send repair person within 12 hours
December 11, 2002	Securite adjusted and repaired gate
January 5, 2003	Lydia Jaynes called to say that security gate would not close all the way
January 6, 2003	Call placed to Securite Company; will send repair person within 12 hours
January 8, 2003	Securite adjusted and repaired gate
February 10, 2003	Floyd White reports that a car pulling out of the garage ran into the side support for the security gate. Door seems to be out of

	alignment
February 10, 2003	Call placed to Securite Company; will send repair person within 12 hours
February 10, 2003	Securite adjusted and repaired gate; no sign of permanent damage from car striking support
March 16, 2003	Lydia Jaynes called to say that security gate would not close all the way
March 20, 2003	Call placed to Securite Company; will send repair person within 12 hours
March 21, 2003	Securite adjusted and repaired gate
April 22, 2003	Mel Grant reported the security gate was sluggish; it had to be raised and lowered a couple of times before it would close all the way. Maintenance checked it out and reported there was no problem
May 15, 2003	Securite called to check on gate
May 18, 2003	Betty Miner called to say that security gate would not close all the way
May 27, 2003	Call placed to Securite Company; will send repair person within 12 hours

June 5, 2003	Securite adjusted and repaired gate
June 30, 2003	Called Securite to repair security gate. Stops before closing fully; will send repair person within 12 hours
July 2, 2003	Securite adjusted and repaired gate

THURSDAY AFTERNOON
JULY 29, 2004

California
Bar
Examination

Performance Test B
LIBRARY

JAYNES v. PALM GARDENS GROUP

LIBRARY

Putnam v. Winters Group
Columbia Supreme Court (2000)

We granted review in this case to consider important issues concerning the liability of apartment owners and other business enterprises to persons injured on their premises by the criminal acts of others, a liability based solely on the business owners' negligent failure to provide adequate security measures to protect those who enter or reside on their property. The difficulty in resolving these issues is enhanced by the need to balance two important and competing policy concerns: society's interest in compensating persons injured by another's negligent acts, and its reluctance to impose unrealistic financial burdens on property owners conducting legitimate business enterprises on their premises.

We conclude that the trial court properly granted summary judgment to defendants based on plaintiff's failure adequately to demonstrate that defendants' negligence was an actual, legal cause of her injuries.

STANDARD OF REVIEW

Because plaintiff appeals from an order granting defendants' summary judgment, we must independently examine the record to determine whether there are triable issues of material fact and whether defendants are entitled to judgment as a matter of law. To prevail at trial on her action in negligence, plaintiff must prove each of the elements by a preponderance of the evidence – that is, that defendants owed her a legal duty, that they breached the duty, and that the breach was a legal or proximate cause of her injuries. Accordingly, to prevail on their summary judgment motion, the defendants need only establish that the plaintiff does not possess, and cannot reasonably expect to obtain, evidence that would allow a rational trier of fact to find all of the elements of negligence by a preponderance of the evidence.

Therefore, we must determine whether defendants in the present case have shown, through the evidence adduced in this case, including security records and deposition testimony, that plaintiff Putnam has not established, and cannot reasonably expect to establish, a *prima facie* case of causation, a showing that would forecast the inevitability of a nonsuit or

directed verdict in defendants' favor. If so, then under such circumstances the trial court was well justified in awarding summary judgment to avoid a useless trial.

In performing its *de novo* review, the trial court must view the evidence in a light favorable to plaintiff as the opposing party, liberally construing her evidentiary submission while strictly scrutinizing defendants' own showing, and resolving any evidentiary doubts or ambiguities in plaintiff's favor.

FACTS

On March 15, 1996, plaintiff Linda Putnam was an employee of Postal Delivery Express. Defendants were owners of the Harwood Apartments, a 28-building, 300-unit apartment complex located on a several-acre site in the City of Coolidge. Plaintiff came to the complex in midafternoon to deliver a package to a resident. As she entered through one of the many gated entrances to the premises, she saw two young men loitering outside a security gate that had been propped open. While walking across the grounds she saw another young man already on the premises.

Plaintiff's attempt to deliver the package proved unsuccessful because the resident was not at home. When plaintiff returned down a walkway with the package in hand, the three men confronted her, and one of them asked, "Where do you think you're going?" When she failed to reply, another one said, "You're not going anywhere." Then the three of them beat her and attempted to rape her, inflicting serious injuries. After assaulting plaintiff, her assailants fled and were never apprehended.

Plaintiff's complaint alleged that defendants, knowing that dangerous persons frequented their premises, nonetheless failed to maintain the premises in a safe condition, failed to provide adequate security, and failed to warn others of the unsafe conditions. Defendants moved for summary judgment on the basis that plaintiff was unable to establish any substantial causal link between defendants' omissions and plaintiff's injury. Plaintiff offered no evidence showing the identity of her assailants, whether they were gang members,

whether they trespassed on defendants' property to assault her, or whether they were tenants of the building who were permitted to pass through the security gates. Similarly, plaintiff submitted no evidence showing that the propped-open security gate was actually broken or otherwise not functioning properly, or whether her assailants entered through the gate or themselves broke it and entered. Finally, plaintiff offered no evidence that defendants reasonably or effectively could have warned members of the public such as plaintiff of unspecified dangers from unknown assailants frequenting the area.

As the trial court found, plaintiff presented evidence that defendants knew of frequent recurring criminal activity on the premises of their 28-building apartment complex. Coolidge was a high-crime area, with considerable juvenile gang activity occurring both on and off defendants' premises. Plaintiff provided police reports and security logs showing that within the year prior to her assault, defendants received 41 reports of trespass, and 45 reports of occasions in which various perimeter fences and gate doors were broken or rendered inoperable. The list of criminal activity on the premises included incidents of gunshots, robberies, and sexual harassment of women, including sexual assaults and rapes.

Defendants' security manager acknowledged that during the year preceding the assault on plaintiff, several nighttime assaults, and actual or attempted rapes, occurred on the premises. Plaintiff produced evidence that a gang called the 706 Hustlers was reportedly "headquartered" in one of defendants' apartment buildings, conducting drug transactions, and hitting and intimidating other people on the premises. In the year prior to the incident involving plaintiff, sheriff's officers came to the Harwood Apartments approximately 50 times. Much of this criminal activity was reported to defendants' manager, either in daily incident reports from their nighttime security officers or in police reports. Some pizza parlors refused to deliver to apartments in the complex, insisting residents come to the sidewalk if they wanted delivery of pizzas ordered by phone. Defendants' apartment manager used security personnel to escort her to her vehicle whenever she left the premises.

On the other hand, defendants' security logs showed that they took some steps to control the situation, hiring security guards to patrol the premises *at night*, and making frequent and regular attempts to repair broken locks or nonfunctioning gates. The record indicates that these guards were on daily duty from approximately 5:00 p.m. to 5:00 a.m. Defendants' manager stated that the guards' starting times ranged from 3:00 p.m. to 5:00 p.m., to make their schedule less predictable, and that defendants occasionally, on a random basis, employed full-time 24-hour security patrols on the premises. Defendants imposed a nighttime curfew on juveniles, and posted notices threatening eviction of tenants involved with drugs or gang activities. Defendants' security logs indicated their manager and security guards regularly checked access gates for forced entry and broken locks, broke up fights, forced aggressive tenants or trespassers to leave the premises, and evicted tenants involved in criminal or gang activity.

Plaintiff observes that police officers advised both defendants' apartment manager and the head of the security firm they employed that they should hire *daytime* as well as nighttime security patrols. Plaintiff filed a lengthy declaration from a security expert, Robert Murphy, who had reviewed the security logs and depositions and had personally visited the Harwood Apartments complex. His qualifications included service as Director of Police and Safety for the Housing Authority of Dos Padres County, as well as advanced education in public safety and several years in law enforcement. At the time he made his declaration, he was a full-time instructor in criminal justice and police science at a community college. Murphy expressed the opinion "that this attack, assault and battery, and attempted rape on the plaintiff would not have occurred had there been daytime security and a more concerted effort to keep the gates repaired and closed. ... It is my opinion that the premises were a haven for gangsters and hoodlums which further encouraged criminal activity as evidenced by the long history of criminal activity in the one year prior to this incident."

The trial court granted summary judgment for defendants, finding plaintiff had failed to show defendants' breach of duty to safeguard her was a proximate cause of her assault. Based

on the parties' submissions, the court found "overwhelming evidence" of prior incidents of trespass and broken or inoperable perimeter fences or gates, and a "long list" of criminal activity on the premises, including a juvenile gang possibly "headquartered" there. But despite establishing the "high foreseeability" that violent crime would occur on the premises, and defendants' resultant duty to provide increased security, the court found that plaintiff failed to establish a "reasonably probable causal connection" between defendants' breach of duty and plaintiff's injuries.

DISCUSSION

As indicated, in this case plaintiff, injured on defendants' premises by the criminal assault of unknown assailants, seeks to recover damages from defendants on the theory that they breached their duty of care toward her. In order to prevail in such a case, the plaintiff must prove that the defendant owed her a legal duty of care, the defendant breached that duty, *and the breach was a proximate or legal cause of her injury.* Although plaintiff devotes a substantial portion of her brief to the issue of defendants' *duty of care,* defendants do not contest, for purposes of their summary judgment motion, that they may have owed and breached a duty of care toward plaintiff. Here, we are solely concerned with the issue of *causation.* Was defendants' possible breach of duty a substantial factor in causing plaintiff's injuries?

The rule in Columbia is that the plaintiff must prove, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures. In the context of this case, the causation analysis is unaffected by the fact that the assailant's conduct was criminal and not merely negligent. Stated in traditional terms, the assailant's attack is not a superseding cause and it does not, in itself, relieve the defendant of liability. If the likelihood that a third person may act in a particular manner is one of the hazards which makes the actor negligent, such an act, whether innocent, negligent, intentionally tortious, or criminal, does not prevent the actor from being liable for harm caused thereby.

In deciding whether the plaintiff has presented evidence of a triable issue of material fact, we consider both direct and circumstantial evidence, and all reasonable inferences to be drawn from both kinds of evidence, giving full consideration to the negative and affirmative inferences to be drawn from all of the evidence, including that which has been produced by the defendant. We will not, however, draw inferences from thin air. Where, as here, the plaintiff seeks to establish that there is a triable issue of fact by means of circumstantial evidence, she cannot recover merely by showing that the inferences she draws from those circumstances are *consistent* with her theory. Instead, she must show that the inferences favorable to her are *more reasonable or probable* than those against her.

Here, by reason of the prior criminal assaults and incidents on the premises, defendants may have owed a duty to provide a reasonable degree of security to persons entering them. For purposes of discussion, we assume defendants breached that duty by failing to: (1) keep all entrance gates locked and functioning, and (2) provide additional daytime security guards to protect persons such as plaintiff. But the evidence fails to show that either breach contributed to plaintiff's injuries in this case. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, *it becomes the duty of the court to grant summary judgment for the defendant.*

Plaintiff admits she cannot prove the identity or background of her assailants. They might have been unauthorized trespassers, but they also could have been tenants of defendants' apartment complex, who were authorized and empowered to enter the locked security gates and remain on the premises. The primary reason for having functioning security gates and guards stationed at every entrance would be to exclude *unauthorized* persons and trespassers from entering. But plaintiff has not shown that her assailants were indeed unauthorized to enter. Given the substantial number of incidents and disturbances involving defendants' own tenants, and defendants' manager's statement that a juvenile gang was

"headquartered" in one of the buildings, the assault on plaintiff could well have been made by tenants having authority to enter and remain on the premises. That being so, and despite the speculative opinion of plaintiff's expert, she cannot show that defendants' failure to provide increased daytime security at each entrance gate or functioning locked gate was a substantial factor in causing her injuries. Put another way, she is unable to prove it was "more probable than not" that additional security precautions would have prevented the attack.

Plaintiff, citing her expert's declaration, opines that her injuries could have been avoided if defendants had hired roving security guards to patrol the entire premises during the day as well as at night. Aside from the inordinate expense of providing such security for a 28-building apartment complex, the argument is entirely speculative, as assaults and other crimes can occur despite the maintenance of the highest level of security. As previously noted, proof of causation cannot be based on an expert's opinion based on inferences, speculation and conjecture. Despite her expert's speculation, plaintiff cannot show that roving guards would have encountered her assailants or prevented the attack. A 300-unit, 28-building apartment complex contains many rooms, halls, entries, garages, and other spaces where a rape could take place despite extensive security patrols.

Finally, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? To characterize a landowner's failure to deter the wanton, mindless acts of violence of a third person as the “cause” of the victim's injuries is on these facts to make the landowner the insurer of the absolute safety of everyone who enters the premises. Moreover, the ultimate costs of imposing liability for failure to provide sufficient daytime security to prevent assaults would be passed on to the tenants of low-cost housing in the form of increased rents, adding to the financial burden on poor renters.

Thus, in a given case, direct or circumstantial evidence may show the assailant took advantage of the defendant's lapse (such as a failure to keep a security gate in repair) in the

course of committing his attack, and that the omission was a substantial factor in causing the injury. Eyewitnesses, security cameras, even fingerprints or recent signs of break-in or unauthorized entry, may show what likely transpired at the scene. In the present case no such evidence was presented, but the circumstances in other cases may well be different. We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person. But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented. As we have seen, most of the assaults and similar incidents of crime plaintiff has cited occurred during the night, and the record indicates defendants did provide extensive nighttime security. Moreover, plaintiff's own evidence showed that defendants at least attempted to keep all security gates in working order, performing regular inspections and repairs.

But again, even assuming a triable issue existed regarding the extent or reasonableness of defendants' security efforts, there was no triable issue with regard to causation. No matter how inexcusable a defendant's act or omission might appear, the plaintiff must nonetheless show the act or omission caused, or substantially contributed to, her injury. Otherwise, defendants might be held liable for conduct which actually caused no harm, contrary to the recognized policy against making landowners the *insurer* of the absolute safety of anyone entering their premises.

In short, plaintiff cannot prove that defendants' omissions were a substantial factor in causing her injuries. Plaintiff has had ample opportunity, through pretrial discovery, to marshal evidence showing that defendants' asserted breach of duty actually caused her injuries. However, the evidence merely shows the speculative possibility that additional daytime security guards and/or functioning security gates might have prevented the assault. Plaintiff's evidence is no less speculative because she offered a security expert's testimony.

Because he was equally unaware of the assailants' identities, his opinion regarding causation is simply too tenuous to create a triable issue whether the absence of security guards or functioning gates was a substantial factor in plaintiff's assault.

The judgment of the trial court is affirmed.